

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re ALANNI M. and KAYLA N., Minors.

B170229

FAYE N.,

(Super. Ct. No. CK35239)

Petitioner,

v.

THE SUPERIOR COURT OF THE STATE  
OF CALIFORNIA FOR THE COUNTY OF  
LOS ANGELES,

Respondent.

LOS ANGELES COUNTY DEPARTMENT  
OF CHILDREN AND FAMILY SERVICES  
et. al.,

Real Parties in Interest.

ORIGINAL PROCEEDING; petition for writ of mandate. D. Zeke Zeidler,  
Temporary Judge. (Pursuant to Cal. Const. art. VI, § 21.) Petition denied.

Timothy Martella for Petitioner.

No appearance for Respondent.

Lloyd W. Pellman, County Counsel, Kenneth E. Reynolds, Senior Deputy County  
Counsel for Real Party in Interest Los Angeles County Department of Children and  
Family Services.

Law Offices of Kenneth P. Sherman and Christopher J. Taylor for Real Party in Interest Kayla N.

Petitioner Faye N. is the mother of six-year-old Alanni M. and five-year-old Kayla N., children who have been declared dependents of the juvenile court. In the instant proceeding, Faye seeks extraordinary writ review (Welf. & Inst. Code, § 366.26, subd. (I)<sup>1</sup>; Cal. Rules of Court, rule 39.1B) of the juvenile court's orders (1) setting a hearing to consider termination of parental rights and adoption as the permanent plan for the children, and (2) denying her petition to change her visitation with the children from monitored to unmonitored (§ 388). Faye's petition is opposed by the Department of Children and Family Services (Department) and also by Kayla, who has filed a joinder in the Department's brief in opposition to the petition. We deny the petition, finding no merit in Faye's contentions the court (1) improperly set the section 366.26 hearing without prior notice, and (2) abused its discretion in denying her petition for modification of visitation.

### **FACTS AND PROCEDURAL BACKGROUND**

Alanni and Kayla were removed from Faye's care and made court dependents in 1998, after Kayla was born with a positive toxicology screen for cocaine and Faye also tested positive for cocaine.<sup>2</sup> Over the next several years Faye made progress toward reunification, and in May 2001 the children were placed in her home under the Department's supervision. Soon thereafter, however, Faye relapsed into drug use and she engaged in violent confrontations with Kayla's father, and the Department filed a subsequent petition (§ 342) alleging these new circumstances. In December 2001 the court sustained the subsequent petition. At the dispositional hearing in January 2002 the court terminated family reunification, found there was a possibility of guardianship or adoption, and set a section 366.26 hearing to select a permanent plan for Alanni and

---

<sup>1</sup> All further statutory references are to the Welfare and Institutions Code.

<sup>2</sup> A third child (Anli), born in 1994, was also made a court dependent. Anli was returned to Faye's care in 2001, the court terminated its jurisdiction over her, and she is not a subject of this petition.

Kayla. On July 25, 2002 the court conducted the section 366.26 hearing, appointed legal guardians for the children, and terminated its dependency jurisdiction while retaining jurisdiction of the guardianship (§ 366.4). Monitored visitation was granted to Faye, and discretion was granted to the guardians to liberalize visits.

In June 2003 Faye filed a petition seeking to modify her visitation with the children to permit unmonitored visits. The court set the matter for a hearing on August 8, and ordered the Department to prepare a report. The Department conducted an investigation, and on August 8 recommended denial of Faye's petition. In the report, the Department indicated Faye had not visited with the children since December 2002; Faye claimed the guardians had thwarted visitation, but the guardians stated Faye had an open invitation to visit. The social worker concurred with the guardians' statements.

As part of its report, the Department also noted the "legal guardians . . . are in the process of moving forward with adoption of the girls [who] are thriving in the care of their . . . future adoptive parents." The hearing was continued on August 8 to afford Faye's counsel additional time to prepare, and was ultimately conducted September 18.

During the course of the hearing, the court called attention to the Department's indication the guardians wished to adopt the children, and suggested a new section 366.26 hearing should be set to determine whether adoption would be the most appropriate plan. After hearing argument, the court denied Faye's section 388 petition to modify visitation and set a hearing pursuant to section 366.26 to determine whether to select and implement a permanent plan of adoption.

### **CONTENTIONS AND DISCUSSION**

We reject Faye's contention the court improperly set the section 366.26 hearing without prior notice to her that such action might be taken. When, as here, a legal guardianship is in place, subdivision (c) of section 366.3 requires the Department to notify the court whenever it becomes aware of new circumstances indicating adoption may be the appropriate permanent plan. Upon receipt of such notice, the court may elect to set a 366.26 hearing to determine whether the permanent plan of adoption should

be implemented.<sup>3</sup>

The record in this case shows that both the Department and the juvenile court complied with the statutory requirements. The Department conducted an investigation after Faye filed her modification petition. In that investigation, the Department learned that the guardians were now moving forward toward adoption, and notified the court of these changed circumstances in the August 8 report. On the basis of the new information, the court set a section 366.26 hearing. The court had authority to set the section 366.26 hearing immediately upon receipt of the Department's notice, without making a finding of changed circumstances and without conducting an evidentiary hearing. Section 366.3, subdivision (c) permits the juvenile court to schedule a new section 366.26 hearing to determine whether adoption may be a more appropriate plan for children. (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1107.) That case rejected the contention "that preliminary to a new section 366.26 hearing under section 366.3, subdivision (c), there must be a separate noticed hearing upon a section 388 petition on the issue of whether there are sufficient changed circumstances to warrant setting the section 366.26 hearing in the first instance[. W]e conclude that no appropriate authority is cited to support such a procedural requirement and the language of section 366.3, subdivision (c), does not on its face require such a judicial finding or separate evidentiary hearing." (*Id.* at p. 1106.)

Even if the law required prior notice to Faye before the court could set a section 366.26 hearing, Faye cannot show a lack of notice. Faye's counsel had ample opportunity to examine the Department's report containing the information regarding the guardians' desire to adopt the children, especially in view of the continuance of the August 8 hearing at his request. Counsel did not voice any objection to the setting of a

---

<sup>3</sup> The statute provides, in part: "If, following the establishment of a legal guardianship, the county welfare department becomes aware of changed circumstances that indicate adoption may be an appropriate plan for the child, the department shall so notify the court. The court may vacate its previous order dismissing dependency jurisdiction over the child and order that a hearing be held pursuant to Section 366.26 to determine whether adoption or continued legal guardianship is the most appropriate plan for the child."

section 366.26 hearing based on lack of notice at the September 18 hearing, nor did he request a continuance for additional time to address the issue. Therefore, Faye cannot show a lack of notice, and in any case she waived any objection on that ground.

We also reject Faye's claim the denial of her section 388 petition was an abuse of discretion.<sup>4</sup> The juvenile court's determination whether to modify a previously made order will not be disturbed unless an abuse of discretion is clearly established (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1704), and the record in this case shows that the court acted within its discretion. Although there is conflicting testimony, there is sufficient evidence of delays in resolving the substance abuse and domestic violence problems, and of problems of inconsistent visits with the children, to support the court's determination a change to unmonitored visitation would not be in the children's best interests. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

#### **DISPOSITION**

The petition is denied on the merits.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ZELON, J.

We concur:

PERLUSS, P. J.

JOHNSON, J.

---

<sup>4</sup> Although an order denying a section 388 petition is appealable, Faye's contention is cognizable in the instant proceeding because the order was made contemporaneously with an order setting a section 366.26 hearing. (*In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1022-1024.)